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**In the
Supreme Court of the United States.**

October Term, 1991

UNITED STATES DEPARTMENT
OF COMMERCE, et al.,
Appellants

v.

STATE OF MONTANA, et al.,
Appellees

On Appeal From the United
States District Court
for the District of Montana

**BRIEF OF THE COMMONWEALTH
OF MASSACHUSETTS AS AMICUS CURIAE
IN SUPPORT OF APPELLEES**

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INTEREST OF AMICUS CURIAE
AND SUMMARY OF ARGUMENT

The Commonwealth's Interest. In
this case, the State of Montana has
challenged the formula, known as the
"Hill" method, used in each census since

1941 to apportion seats in the United States House of Representatives among the States. 2 U.S.C. 2a. The district court ruled the Hill method unconstitutional. J.S. App. 1a-34a. The Commonwealth of Massachusetts, as amicus curiae, supports this result and submits this brief in support of the State of Montana.

To the extent the district court and the State of Montana favor use of the so-called "Dean" method of apportionment, however, the Commonwealth does not concur. As amicus curiae and in separate proceedings pending before a three-judge court in the District of Massachusetts, the Commonwealth advocates a different, well-established method of apportionment -- the "Webster" or "major fractions" method. Under the

Webster method, Massachusetts will retain the eleventh Congressional seat it stands to lose under the 1990 Census. The Commonwealth of Massachusetts, therefore, has an important interest in the outcome of this litigation.

The Massachusetts Proceedings. In Commonwealth of Massachusetts v. Mosbacher, et al., C. A. No. 91-11234-WD (D. Mass.) (hereinafter the "Massachusetts proceedings"), the Commonwealth sued the Secretary of Commerce, the President of the United States, and other federal officials on May 1, 1991, challenging the use of the Hill method of apportionment and advocating use of the Webster method. Based in part on a Stipulation of Facts, lodged with this Court (hereinafter

"Stip.") and into which the appellants herein entered, the parties filed cross-motions for summary judgment. These were heard on December 6, 1991 by a three-judge panel which has those motions under advisement. Among the affidavits submitted by the Commonwealth in those proceedings is an analysis performed by one of the nation's preeminent experts on congressional apportionment, Professor H. Peyton Young of the School of Public Affairs at the University of Maryland at College Park. Professor Young co-authored the leading text on apportionment history and formulas, which has been cited repeatedly in both parties' briefs to this Court and as the sole treatise cited by the district court: M.L. Balinski and H.P. Young, Fair Representation: Meeting the Ideal of

One Man, One Vote (New Haven: Yale University Press, 1982) (hereinafter "Fair Representation"). This volume, together with Professor Young's curriculum vitae, his affidavit in support of this brief (hereinafter "Young Aff."), and a Congressional study, D.C. Huckabee, House Apportionment Following the 1990 Census: Using the Official Counts, CRS Report for Congress (Feb. 4, 1991) (hereinafter "CRS Report for Congress"), have been lodged with the Court.

Summary of Argument. The history and purpose of Article I, Section 2, as explained in Wesberry v. Sanders, 376 U.S. 1 (1964) and its progeny, require "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

Id. at 7-8. In the context of intrastate apportionment, this goal is achievable by equalizing district sizes, which gives each person an equal share of his or her representative. Karcher v. Daggett, 462 U.S. 725, 730-31 (1983). In the context of interstate apportionment, however, discrepancies in district size are inherent in the constitutional requirements that every state have at least one congressional seat and no congressional district may cross a state boundary. The constitutional principle articulated in Wesberry of equalizing the value of each person's vote requires, therefore, that a method of apportionment must come as close as practicable to equalizing each person's share of a representative. The current Hill method of apportionment

(2 U.S.C. 2a) demonstrably fails to meet the goal of achieving, as nearly as practicable, equal shares of a representative for each person. Another method, Webster's, is superior.

In addition, the formula used for congressional apportionment should not be biased toward either more or less populous states. The use of a biased formula violates the principles of the Great Compromise of 1787. Both the Hill and the Dean methods are inherently biased toward less populous states.

The Webster method of apportionment brings each person's share of a representative as near equality as possible regardless of the state in which they reside. Moreover, Webster's method is not biased toward either more or less populous states.

Accordingly, the Commonwealth respectfully requests that this Court affirm the district court's judgment that 2 U.S.C. 2a is unconstitutional and mandate the use of the Webster method to reapportion the House based upon the 1990 census.

ARGUMENT

I. ARTICLE I, SECTION 2 OF THE CONSTITUTION REQUIRES APPORTIONMENT OF CONGRESSIONAL DISTRICTS SO THAT EACH CITIZEN HAS EQUAL REPRESENTATION "AS NEARLY AS PRACTICABLE."

A. The Exacting "One-Person, One-Vote" Requirements For Intrastate Apportionment Of Congressional Districts Apply Also To Apportionment Of Such Districts Among The States.

The Apportionment Clause of the Constitution mandates that seats in the House of Representatives "be apportioned

among the several States ... according to their respective Numbers." Art. I, §2, cl. 3. Article I, Section 2 and the underlying principle that apportionment of House seats shall be based on population grew out of the Great Compromise at the 1787 Constitutional Convention. J.S. App. 1a-34a, at 7a (citing 1 Records of the Federal Convention of 1787 488 (Farrand Ed. 1911)). The Great Compromise resolved a bitter conflict between large and small states that divided the Convention. Representatives from small states favored a national assembly with equal representation for all states; those from larger states argued for representation based on population. The Great Compromise created the Senate, in which citizens of small states are

better represented than voters from large states, and the House, where all citizens have equal representation.

The Supreme Court has consistently interpreted the Apportionment Clause to require the apportionment of congressional districts within states to achieve the goal of equal representation for its citizens. Karcher v. Daggett, 462 U.S. 725, 730 (1983); Wells v. Rockefeller, 394 U.S. 542, 544 (1969); Wesberry v. Sanders, 376 U.S. 1, 18 (1964). Article I, Section 2 commands that this be accomplished "as nearly as is practicable." Wesberry, 376 U.S. at 7-8; Karcher, 462 U.S. at 730.

To achieve the goal of equal representation "as nearly as practicable," this Court has applied the most exacting standards to the

apportionment process. The "unusual rigor" of the Wesberry standard in the context of intrastate apportionment under Article I, Section 2 "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Karcher, 462 U.S. at 730, 732. See also White v. Weiser, 412 U.S. 783, 790 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969). Not even de minimis population variations are permitted if they can practicably be avoided. Karcher, 462 U.S. at 734. Political compromises are not compatible with the goal of equality of votes. "[T]he rule is one of 'practicability' rather than political 'practicality.'" Kirkpatrick, 394 U.S. at 533.

That this Court has been so protective of the right to an equal vote reflects the fundamental importance of the right to vote itself:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry, 376 U.S. at 17; see Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Although these and the pending Massachusetts proceedings present the issue as a matter of first impression, the principles of Wesberry necessarily apply to interstate, as well as intrastate, apportionment. This result inheres in the importance of the right to vote; the text of Article I, Section

2; and this Court's prior apportionment decisions. Indeed, if Article I, Section 2 requires state legislatures to come "as nearly as practicable" to equality in apportioning House seats, as it clearly does, then there is no defensible argument for not holding Congress to the same standard. The very text of Article I, Section 2 applies by its terms to apportionment "among the several States." (Emphasis added.) It was the Great Compromise itself, predominantly concerned with the allocation of representation among the States, that spawned Article I, Section 2 and its underlying principle that apportionment of House seats shall be based on population. Wesberry, 376 U.S. 1, 13; J.S. App. 7a. The district court correctly noted that the rationale

underlying Article I, Section 2 and articulated in Wesberry "has more relevance to the national apportionment issue than to intrastate redistricting." J.S. App. 10a.

The government attempts to avoid this result by claiming that Wesberry rests only on Clause 1 of Article I, Section 2 and, thus, applies only to intrastate apportionments. (Appellants' Br. at 44-45) This attempt to parse Clauses 1 and 3 of the Apportionment Clause finds no support whatsoever in Wesberry. To the contrary, the Court quotes and construes both clauses together -- "that Representatives shall be chosen 'by the People of the several States' [cl. 1] and shall be 'apportioned among the several States . . . according to their respective

Numbers' [cl. 3]" (376 U.S. at 17) -- as a cohesive whole; and it does so "in light of" the history of the Constitutional Convention and the Great Compromise, with its predominant concern over interstate apportionment. 376 U.S. at 9-17.^{1/}

This unduly narrow reading of Wesberry is the logical extension of the government's broader but cavalier argument that any apportionment method "rationally tied to population" (Appellants' Br. at 24) or "plausibly" related to state populations (id. at 28) will pass muster. The argument, however,

^{1/} Justice Harlan, in dissent, recognized that the majority in Wesberry relied on Clause 3, as well as Clause 1, for its holding. 376 U.S. at 26.

misses the fundamental constitutional point to which the "as nearly as practicable" requirement is addressed: the right of each citizen to equal representation.^{2/} From the Constitutional Convention to Wesberry to Karcher to the present, it is the representation of the "people as individuals, and on a basis of complete equality for each voter" that the Constitution protects. Wesberry, 376 U.S. at 14.

The Commonwealth thus agrees with the district court that "there is no principled reason why" the standards set forth in Wesberry should not apply to

^{2/} There are formulas which may be "rationally tied to population" but produce results which diverge greatly from the goal of equal representation. See Young Aff. ¶9.

interstate redistricting.^{3/} J.S. App. 9a. Because of the mandates that every state must receive at least one seat and no district may cross a state boundary, absolute equality of representation is impossible. Art. I, §2, cl. 3; J.S. App. 9a; 2 J.A. 69-70. These constitutional mandates, however, in no way suggest, much less require, that the goal of equal representation "as nearly as practicable" be abandoned in the context of apportionment of congressional districts among the states. To the contrary, the "as nearly as practicable" standard has that much more meaning in this context. It

^{3/} The Commonwealth hereby adopts by reference the State of Montana's argument that this Court should affirm that portion of the district court holding that applies the "one-person, one-vote" mandate of Wesberry to the case at bar. Appellees' Br. at 30-34.

evolved in this Court precisely because absolute equality in legislative apportionment is virtually impossible. Karcher, 462 U.S. at 730.

Indeed, this standard finds its roots in the early history of interstate apportionment. Daniel Webster observed in 1832 that the Constitution requires "Congress to make the apportionment of Representatives among the several States according to their respective numbers, as near as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be." D.

Webster, The Writings and Speeches of Daniel Webster, 107-09 (1903) (quoted at J.S. App. 11a, n. 2) (emphasis in the original); Young Aff. ¶3.

The Framers thus intended, and the Constitution mandates, equal

representation "as nearly as practicable" in the interstate apportionment of House seats. As explained below, because it equalizes the value of each person's vote, or more precisely, each voter's share of a representative, as nearly as practicable, the Webster method is the only formula that meets this constitutional command.

B. In Interstate Apportionments, Equalizing Each Voter's Share Of A Representative Achieves The Wesberry Ideal.

There are at least three ways in which the constitutional command of representation based on population could be translated into a statistical test for allocation formulae: (1) variability from the ideal number of persons per district, (2) variability from the ideal share each person should have of his representative's vote, or (3) variability of nearness to quota.

J.S. App. 27a, n.4 (O'Scannlain, J., dissenting) (quoting H.Rep. No. 18, 97th Cong., 1st Sess. 58 (1981)).

Among these three measures of inequity which may serve as the criteria for apportionment formulas, the district court applied the first, and favored (but did not order) the Dean method in an effort to minimize the absolute differences in the size of congressional districts. J.S. App. 13a-16a. This follows the approach in Karcher, where the Court held that the proper approach in intrastate apportionments is to reduce or eliminate population differences among congressional districts. 462 U.S. at 730.

Karcher's focus on equal district sizes achieves in the intrastate context the paramount goal of Wesberry: it

ensures that each member of Congress represents the same number of people as nearly as practicable, thereby equalizing the value of each person's vote. Young Aff., ¶19. In the interstate context, however, attempting to achieve equal district sizes does not best effectuate this paramount goal. Because of the constraints imposed by Article I, that no district may cross a state boundary and each state must receive at least one seat, substantial discrepancies in district size among the states are inevitable. It is thus impossible to have each House seat represent the same number of people. J.S. App. 9a; 2 J.A. 69-70; Young Aff. ¶19. For mathematical reasons explained by Professor Young, interstate apportionment formulas which attempt to

equalize district sizes produce illogical results and do not necessarily treat individuals equitably. Young Aff. ¶19-24. To the contrary, they each tend to bias the outcome in favor of small states, and yield "reversals," an anomaly (discussed at pt. II, A, 2, infra) which violates the "near as may be" standard. Young Aff., ¶8.

Minimizing discrepancies in district sizes tends to produce similar numbers for each representative; but the Constitution does not protect the right of each Congressman to have equal numbers of people in his or her district.^{4/} Young Aff. ¶40.

^{4/} The government's own expert agrees that, although "[c]ontrolling for average district size ensures equity in the average number of persons

(footnote continued)

The goal in apportioning Congressional districts is instead to make each person's vote "worth as much as another's." Wesberry, 376 U.S. at 8. By definition, this requires a per capita or per voter standard. This necessitates focus on each voter's "share of a representative" (the second test mentioned in Judge O'Scannlain's

(footnote continued)

represented by each member of the House . . . for intra-state districts, . . . Controlling for each person's share of a representative ensures equity in the average number of members of the House that represent each person. It can be argued that the latter is a better test of 'one person, one vote' for districts between states since it measures the portion of a vote (member) to which a person is entitled in the House." Ernst Decl. ¶17 (1 J.A. 25-26). The government also cites with favor Daniel Webster himself, who rejected the district-size test in favor of a focus on the state's "overall share of representation in the House." Appellants' Br. at 38-39 n.31.

dissent in the district court). Young Aff. ¶19-23. In other words, only the "share-of-a-representative" principle truly expresses the "one-person, one-vote" standard, a per capita standard, enunciated in Wesberry and its progeny.^{5/}

The government itself makes this case. Not only does its expert challenge the appropriateness of average district size as a proper measure of equity in interstate apportionment (see n.4, supra), but it cites with favor

^{5/} The district court attempted to minimize differences (there, actual differences) between actual district sizes and the ideal. J.S. App. 13a-15a. This focus, on the number of representatives per person or per district (the Dean method), is misplaced. As noted below, the Dean method shares deficiencies with the Hill method, but suffers from them to an even greater degree. (See pt. II, C, infra.)

the endorsement by the Commonwealth's expert, Professor Young, of the "per capita" standard as "the most natural" way to interpret the Wesberry goal of equalizing the value of each vote. Appellants' Br. at 46, n.41 (citing Fair Representation, at 53.)

A historic, mathematically sound and well-accepted method of expressing the share-of-a-representative test is to approach "as near as may be" a state's House seat quota. The quota is the precise number of congressional seats to which a state would be entitled if fractional seats were allowed (e.g., 10.51 or 4.23 seats).^{6/} As a matter

^{6/} This is the third test mentioned by Judge O'Scannlain. The House seat quota is found by dividing the national-average-size congressional district in a given apportionment into the apportionment population of each state. Appellants' Br. at 4, n.2.

of arithmetic, a state's quota is simply the sum of the shares of a representative of the individuals within that state. The quota is thus effectively an aggregate measure of each individual's share of a representative. Young Aff. ¶5.

If states could receive their respective quotas, apportionments would be ideal. All persons would have the same share of a representative.^{7/} While achieving quota in interstate apportionments is impossible, the goal of equal representation is only approached if the apportionment comes as near to quota as possible.

Just as the courts, in the context of intrastate apportionment, have

^{7/} In addition, all district sizes would be perfectly equal.

required equal representation as nearly as practicable, to the point of issuing court-ordered apportionment plans toward this end,^{8/} so this Court should require Congress to use the Webster method, the only one which, in an interstate context, equalizes as nearly as practicable the value of each person's vote.^{9/}

^{8/} Karcher, 462 U.S. at 734, n.6, and cases cited therein.

^{9/} See pt. III, A, infra.

II. THE WEBSTER METHOD EFFECTUATES THE CONSTITUTIONAL IDEAL OF ONE PERSON, ONE VOTE.

A. The Webster Method Is Superior To All Others In Equalizing The Value Of Each Person's Vote.

1. The Webster Method, Deeply Rooted In The History of Apportionment Formulas, Equalizes Each Voter's Share Of A Representative As Nearly As Practicable.

Over time, Congress has legislated the use of four different formulas to calculate reapportionment.^{10/} Stip. 60-63; Appellants' Br. at 4-14. The Webster method is the most deeply rooted among divisor methods in the history of

^{10/} These formulas, and the history of apportionment methods, are described in more detail at Stip. 60-70, and Appellants' Brief at 5-14.

congressional apportionment.^{11/} Also known as the "method of major fractions," it was used to apportion Congressional seats in 1840, 1910 and 1930.^{12/} Stip. 62, 64, 66; Appellants' Br. at 6-9, 13-14. By

^{11/} The Webster method, along with the Hill, Adams and Dean methods, is a "divisor" method of apportionment. To apportion a fixed number of seats using a divisor method, a national average district size is chosen as the divisor. The divisor is then divided into the population of each state to obtain a quota. Stip. 73, 74. Every method used or considered by Congress since 1790 has been a divisor method, with the exception of the "Hamilton-Vinton" method. See Appellants' Br. at 11-12. Congress abandoned the Hamilton-Vinton method in 1900 because, like all non-divisor methods, it is subject to the "Alabama paradox," an anomaly under which it is mathematically possible that a state's allocation of House seats could be reduced even though the size of the House was increased and the population of all states remained constant. Stip. ¶63; Appellants' Br. at 8.

^{12/} There was no apportionment in 1920.

contrast, the Hill method was not used until the 1940 apportionment, and the other two methods considered by the district court, the Dean and Adams methods, have never been used at all.

The Webster method represents the solution proposed by its namesake to the apportionment problem:

Let the rule be that the population of each state be divided by a common divisor, and, in addition to the number of members resulting from such division, a number shall be allowed to each State whose fraction exceeds a moiety of the divisor.

The Writings and Speeches of Daniel Webster, National Edition (Boston: Little Brown, 1903, Vol. 6), at 120; Young Aff. ¶7.

The superiority of the Webster method and, thus, its status as the only constitutional method of apportionment,

lies in a simple but dispositive proposition: If the constitutional goal underlying the one-person, one-vote standard is to make "as nearly as is practicable one man's vote in a congressional election . . . worth as much as another's" (Wesberry, 362 U.S. at 7-8; see pt. I, B, supra), the Webster method effectuates this per capita test by "minimiz[ing] the differences in representation in the House when those differences are expressed as each resident's share of a representative on an absolute basis." CRS Report for Congress at 19; Appellants' Br. at 46 n.41; Young Aff. ¶30.^{13/} The Webster method does

^{13/} Concededly, in pairwise comparison tests (Young Aff. ¶13), the Hill method reduces the relative difference in

(footnote continued)

so by minimizing the inequality between each individual's ideal share of a representative and his or her actual share as the result of the apportionment. Young Aff. ¶44. The Webster method also minimizes the inequality in the relative representation given to residents of each pair of states, when matched against each other. This is true both in absolute and percentage terms. Young Aff. ¶8, 14, 30, 38, 42, 44.

(footnote continued)

representation per capita. But the relative measure is not only inferior to the absolute or percentage measure (see Young Aff. ¶33-37); it leads to apportionments that are systematically biased against more populous states and that deviate from quota to a greater extent than necessary (pt. II, B, infra, and Young Aff. ¶27-37, 45), and it departs from the test of deviation from the ideal employed by the case law (see Karcher, passim).

Even Dr. Ernst, the expert retained by the Department of Commerce in both the Montana and the Massachusetts proceedings, agrees with Professor Young that the Webster method is "optimal" in minimizing differences between each person's share of a representative.^{14/}

2. The Webster Method Achieves The One-Person, One-Vote Ideal By Staying Nearest To Quota.

As noted above, staying near the quota (the third test enunciated by

^{14/} Controlling for each person's share of a representative ensures equity in the average number of members in the House that represent each person. It can be argued that the [Webster method] is a better test of one-person, one-vote for districts between states since it measures the portion of a vote (member) to which a person is entitled in the House.

Ernst Decl., ¶17 (1 J.A. 25-26).

Judge O'Scannlain (J.S. App. 27a, n.4)) is an alternative and historic measure of how well a method achieves equality in shares of a representative. (See pt. I, B, supra.) The Webster method is the only method that brings every pair of states as near as possible to their quotas in both absolute and percentage terms. Young Aff. ¶30, 42. This was undisputed in the Massachusetts proceedings.

In the process, the Webster method avoids a phenomenon which every other divisor method produces: the anomaly known as a "reversal". A reversal is a situation where a state's quota of seats in the House is rounded up even though its fractional component is below .5 while, in the same apportionment, another state's quota is rounded down

even though its fractional component is above .5. Young Aff. ¶8. A method of apportionment producing reversals thus does not meet the "near as may be" standard. Young Aff. ¶26.

The Hill method, by contrast, yields striking reversals. For example, in 1970, Hill's method rounded up South Dakota (quota 1.435) while it rounded down Connecticut (quota 6.503). If one seat were taken away from South Dakota and given to Connecticut, then both states would be closer to their exact quotas. Young Aff. ¶3. Had the Hill method been in effect in 1920, it would have produced an even more striking reversal: rounding down Virginia (quota 9.547) while rounding up Rhode Island (quota 2.499); rounding down North Carolina (quota 10.581) while rounding

up Vermont (quota 1.457); and rounding down New York (quota 42.92) while rounding up New Mexico (quota 1.46). Young Aff. ¶28-29. Hill has produced (and would have produced, if in effect) other reversals as well. Moreover, in every one of these "reversals," the less populous states are favored over the more populous states. Young Aff. ¶32. The Dean and Adams methods also produce reversals. Young Aff. ¶45.

The Webster method never leads to a reversal. Young Aff. ¶8, 31. It produces apportionments that are always as near each state's quota as practicable. It is thus the only divisor method that produces results that meet the goal of Wesberry -- to equalize each voter's share of a representative -- free from the anomalies inherent in the other methods.

B. The Hill Method Is Fundamentally Flawed And Fails To Achieve One Person, One Vote As Nearly As Practicable.

1. Congress' Choice Of The Hill Method Was Based On Political Expediency.

The statute which adopted the Hill method as the method of apportionment in 1941, 2 U.S.C. 2a, was the product of political expediency. Members of Congress in 1941 selected a formula based not on which one produced the least biased results, but rather on whether Arkansas, a largely Democratic state, or Michigan, a mostly Republican state, would receive an extra House seat in that apportionment.^{15/} Congress

^{15/} A Representative from Michigan observed that one of his Democratic colleagues was quoted "perhaps erroneously -- as having stated that (footnote continued)

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favored Arkansas, and therefore the Hill method, in a vote that split along party lines: every Republican representative voted against adoption of the Hill method, while every Democratic member (except those from Michigan, which would lose a seat) voted for it. Stip. 67.

The government maintains that the decision to adopt the Hill method was based on a 1929 National Academy of Sciences (NAS) study on methods of apportionment. (Appellants' Br. at 10-11, 6a-12a) To the extent any

(footnote continued)

there was no partisanship in this bill; that it was merely a measure to give the Democratic Party a Congressman and a Presidential elector which they could not otherwise be certain of securing." 87 Cong. Rec. 1126 (1941) (statement of Rep. Hoffman). See also Fair Representation at 57-58; J.S. App. 16a, n.6.

members of Congress may have been influenced by the NAS study, it was fundamentally flawed. The study concluded that among the five methods considered, the Hill method "occupies mathematically a neutral position with respect to emphasis on larger and smaller states." Stip. 69; Young Aff. ¶ 49. The study did not, however, constitute a finding that the Hill method was intrinsically unbiased. The sole basis for the study's finding of "neutrality" was that when the five apportionment methods under consideration were listed in order of bias, from those that favored small states to those that favored large states, the Hill method ranked in the middle. Young Aff. ¶50. In fact, the Hill method works an inherent and

systematic bias against more populous states. (See pt. II, D, infra.)

It is also significant that Congress adopted the Hill method before this Court issued its ruling in Wesberry, which established the requirement that each person's vote be worth as much as another's "as nearly as practicable." Thus, even if there were criteria that made the Hill method a rational choice under the standards in effect in 1941, they do not apply today. "A statute which was once validly enacted or constitutional may be rendered unconstitutional by a change in the facts or circumstances upon which it was based." J.S. App. 18a, n.8 (citing Leary v. United States, 395 U.S. 6, 38 n.68 (1969); United States v. Carolene Products Co., 304 U.S. 144, 153 (1938);

Nashville, C. & S.L. Ry. v. Walters, 294 U.S. 405, 415 (1935); Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924)). The district court panel determined that the 1964 Wesberry decision, and demographic changes in the United States population over the past fifty years, "constitute sufficient changes in circumstances to call into question the rationality of 2 U.S.C. § 2a today." J.S. App. 18a, n.8.

There are several compelling reasons to "question the rationality of 2 U.S.C. 2a today." It is fundamentally flawed in the following respects.

2. The Hill Method Does Not Minimize Deviations In Each Voter's Share Of A Representative.

The Hill method simply does not treat the value of each citizen's vote

as equally as possible. Young Aff.

¶41. Hill is inherently problematical in that it relies on an analysis of relative differences in representation as between states. When the goal is to minimize deviation from equality, however, the relative difference test is inappropriate. Young Aff. ¶33. It is problematical in that it treats deviations below the norm as more significant than the same deviations above the norm, whereas analysis of the those deviations on either absolute or percentage terms demonstrates that such deviations are equivalent. Young Aff. ¶35-36.^{16/} For this reason, the

^{16/} The absolute difference between two numbers is the larger number minus the smaller; the relative difference is the absolute difference between them divided by the smaller of the two numbers. Young Aff. ¶34.

"relative difference" criterion is neither standard nor appropriate as a statistical measure of deviation. Young Aff. ¶37.

The effect of the Hill method is that citizens are not treated as equally as possible in terms of their shares of a representative. Young Aff. ¶41. For example, in the 1990 census, the Hill method, in giving Oklahoma 6 seats and Massachusetts 10, does not come as close as Webster would (in giving Massachusetts 11 and Oklahoma 5) in giving each person equal representation in the House. Hill's method fails to achieve such equal representation as "near as may be" in both absolute and percentage terms. Young Aff. ¶41-42. A Webster apportionment brings both states closer, in both absolute⁹ and

percentage terms, to the average share of a representative for the two states combined. Young Aff. ¶42.

Dr. Ernst, the government's expert, agrees that the Webster method is a "better" test than Hill in measuring "the portion of a vote (member) to which a person is entitled in the House." (See n.4, supra.) Since "portion of a vote" is the appropriate test under Wesberry, the government effectively concedes that the Hill method fails to achieve "as nearly as practicable" the ideal of one person, one vote.

3. The Hill Method Deviates Unnecessarily From Quota, And Produces Reversals.

As explained above (pt. II, A, 2, supra), the Hill method fails to come as close as possible to quota, and produces

reversals. In these respects, it fails to achieve as nearly as practicable the goal of equalizing each citizen's share of a representative. Indeed, to the extent it produces these anomalous results, it does so in a way which favors less populous states. (See pt. II, D, infra.)

C. The Dean Method Also Departs Substantially From The One-Person, One-Vote Ideal.

The district court and the State of Montana favor use of the Dean method as the proper method of apportionment. J.S. App. 13a-16a; Appellees' Br. at 36-41. It is fundamentally flawed, however, in a number of respects.

The Dean method is based on using average district size as the measure of inequality. Although that measure works

in an intrastate context, it is not an effective standard in the context of interstate apportionment (see pt. I, B, supra), and does not treat each citizen's vote as equally as possible. Young Aff. ¶19-23, 39-40. The use of average district size in the interstate context tends to bias the outcome in favor of small states. Young Aff. ¶24. Indeed, in 1990, the Dean method fails to meet the one-person, one-vote standard in that it gives Washington's residents a disproportionately larger share of a representative as compared with Montana's residents. Young Aff. ¶43. Indeed, the Dean method is even more biased than the Hill method in favoring less populous over more populous states. Young Aff. ¶24, 59.

In addition, the Dean method produces reversals and, thus, does not stay as near the quota as Webster's method. Young Aff. ¶45.^{17/}

- D. **Because Of The Inherent Bias Against More Populous States Worked By The Other Divisor Methods, And The Relative (If Not Absolute) Lack Of Bias Of The Webster Method, The Latter Is The Only Constitutional Method Of Apportionment.**

Any method of apportionment which has an inherent bias against more populous states, and in favor of less populous states, is unconstitutional. Under the terms of the Great Compromise

^{17/} Accordingly, if this Court were to determine that the Hill method of apportionment were unconstitutional, it should refrain from ordering the adoption of the Dean method. It may order the adoption of the Webster method (see Pt. III, A, infra) or, alternatively, await the benefit of the record in the Massachusetts proceedings.

of 1787, less populous states were granted special representation in the Senate. To permit the use of any apportionment formula for House seats that was biased in favor of less populous states would directly contravene the principles of the Great Compromise, and the requirement that the value of each person's vote be equalized. This is especially true where an unbiased method of apportionment is readily available. The Hill method perpetrates this constitutional vice: it is systematically biased against more populous states and is, therefore, unconstitutional.

The Hill method leads to apportionments that are systematically biased against more populous states, persistently giving the people of less

populous states more representation per capita. Young Aff. ¶53-54, 58. Since it was adopted in 1941, the Hill method has given less populous states, on average, over six percent more representation per capita than it has to more populous states. Young Aff. ¶58. This is not a statistical accident. If Hill's method had been used for every census from 1790 to 1990, it would have given, on average, over 3.3 percent more representation per capita to the less populous states than to the more populous states.^{18/} Id. In contrast,

^{18/} In fact, the Congressional Research Service itself reported that the "Hill formula was found to have 'a definite tendency to give large States less than their fair shares [of seats] and the small states more.'" CRS Report for Congress at 21 (citing H.P. Young and M.L. Balinski, Evaluation of Apportionment Methods, prepared under a contract for the Congressional Research Service of the Library of Congress Contract No. CRS84-15) (Washington, 1984)).

if the Webster method had been used in every apportionment since 1790, it would have given less populous states less than one-half of one percent more representation per capita than more populous states. Young Aff. ¶60. Moreover, over a longer series of apportionments, the Webster method can be expected to exhibit no discernible bias toward either more or less populous states. Young Aff. ¶62. Indeed, in every single census, the percentage difference between a person's share of a representative in more populous states and a person's such share in less populous states would have been smaller (or at least not larger) under Webster's method than under any other divisor method. In this respect, Webster apportionments come closest to

implementing the Great Compromise and the ideal of one person, one vote. Young Aff. ¶61.

The bias that the Hill method produces is not only persistent, but also constitutionally significant. This Court has routinely invalidated apportionment schemes that produce deviations from the ideal of less than one percent. See, e.g., Karcher, 462 U.S. 725 (deviation of 0.6984 percent between largest and smallest district held unconstitutional); White, 412 U.S. 783 (deviation of .745 percent invalidated); Kirkpatrick, 394 U.S. 526. Furthermore, factors that may justify even small deviations from the "as nearly as practicable" standard in state legislative redistricting cases do not apply in the interstate context.

See Reynolds v. Sims, 377 U.S. 533,
578-81 (1964).^{19/}

III. AN ORDER REQUIRING USE OF THE
WEBSTER METHOD IN CONNECTION WITH
THE 1990 CENSUS IS FULLY WITHIN
THIS COURT'S AUTHORITY AND
CONSISTENT WITH THIS COURT'S
APPROACH TO APPORTIONMENT CASES.

A. Given The "Unusual Rigor"
Applied In Apportionment Cases,
Ordering Adoption Of The
Webster Method Is Within This
Court's Authority.

In Karcher, this Court noted the
"unusual rigor" that must be applied to

^{19/} The Supreme Court has recognized a
fundamental difference between state
legislative and congressional
redistricting. Id. at 578 (noting that
"[s]omewhat more flexibility may
therefore be constitutionally
permissible with respect to state
legislative apportionment than in
congressional districting.") Mahan v.
Howell, 410 U.S. 315, 321 (1973) (same);
White v. Weiser, 412 U.S. 783, 793
(1973) (congressional districts "are not
so intertwined and freighted with
strictly local interests as are state
legislative districts").

achieve the goal of equal representation
for equal numbers in the apportionment
of Congressional districts. 462 U.S. at
732-33. As the Court noted, this rigor
has led courts not only to invalidate
existing apportionments achieved by
state legislatures, but to substitute
court-ordered plans in their stead, to
the point of judicial redrawing of
district lines. Id. at 734, n.6; White
v. Weiser, 412 U.S. 783, 794-95 (1973).

The only way to achieve equality of
voting power in the context of
interstate apportionment is to follow
that method of apportionment which best
equalizes votes on a per capita basis.
(See pt. I, B, supra). If there were
any question whether the Hill method
should be tolerated despite its defects

because it was once endorsed by Congress, this Court has firmly concluded in Karcher that, in the context of congressional apportionment, second best is not good enough -- it is unconstitutional. "As between two standards -- equality or something less than equality -- only the former reflects the aspirations of Art. I, §2." Karcher, 462 U.S. at 732.

Accordingly, just as this Court has authorized, and the lower courts have ordered, judicial redrawing of district lines on an intrastate basis, so it is perfectly proper for this Court to order the adoption of the only apportionment method which achieves the one-person, one-vote standard "as nearly as practicable": the Webster method.

B. Enjoining Use Of The Hill Method For The 1990 Census Is Appropriate And Feasible.

The Commonwealth adopts the argument of the State of Montana that it is both appropriate and feasible for this Court to enjoin use of the Hill method for the 1990 census. (Appellees' Br. at 47-48.)

CONCLUSION

The district court's judgment declaring the Hill method (2 U.S.C. 2a) unconstitutional and enjoining its use should be affirmed. Congress should be directed to apportion seats in the House

of Representatives in accordance with
the Webster method of apportionment.

Respectfully submitted,

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ADDENDUM

U.S. Const., Art. 1, §2

2 U.S.C. 2a